

**UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA**

ABDULLAH BYANOONI,
individually and on behalf of a class
and subclass of similarly situated
individuals,

Plaintiff,

v.

MERRILL LYNCH, PIERCE,
FENNER & SMITH; BANK OF
AMERICA CORPORATION; and
DOES 1 through 10, inclusive,

Defendants.

Case No.: 3:12-cv-05270-RS

**[PROPOSED] ORDER
CERTIFYING PROVISIONAL
SETTLEMENT CLASS;
PRELIMINARILY APPROVING
CLASS ACTION SETTLEMENT
AND PROVIDING FOR NOTICE TO
THE SETTLEMENT CLASS AS
MODIFIED BY THE COURT**

HON. RICHARD SEEBORG

On July 31, 2014, a hearing was held on the parties' joint motion for preliminary approval of a settlement class. At that time, the Court expressed concern with the scope of the release in the proposed settlement agreement, which provides in relevant part:

The Named Plaintiff and each Class Member . . . hereby jointly and severally release and discharge defendants Merrill Lynch, Pierce, Fenner & Smith Inc. and Bank of America Corporation . . . from any and all actions, causes of action, obligations, costs, expenses, damages, losses, claims, liabilities, and demands, of whatever character, known or unknown, arising out of, relating to, or in connection with, the operative complaint in the Action, the claims asserted in the Action, *the Released Parties' recording and/or monitoring of calls*, and the administration of this settlement.

[PROPOSED] ORDER CERTIFYING PROVISIONAL SETTLEMENT CLASS; PRELIMINARILY APPROVING CLASS ACTION SETTLEMENT AND PROVIDING FOR NOTICE TO THE SETTLEMENT CLASS

1 (Settlement Agreement, p. 8) (emphasis added). Of particular concern was the fact
2 that, while the class definition is temporally limited to individuals who received calls
3 from defendant on or after August 17, 2011 through the date of preliminary
4 approval, the claims release is not so limited. Both parties represented to the court
5 that the release is not intended to encompass claims beyond the scope of the
6 complaint. Nevertheless, the italicized portion of the release could fairly be read to
7 encompass a release of any claims a class member might possess arising from
8 defendant's recording or monitoring of calls either before or after the class period.
9 In other words, the plain language of the release is not limited to "the Released
10 Parties' recording and/or monitoring of calls during the class period." Although an
11 individual who only received calls from defendant before August 17, 2011 would
12 fall outside of the class definition, an individual who received calls during the class
13 period and also outside of the class period (and who does not opt out) would be
14 bound by this release even for claims arising from calls made before the class period
15 commenced.

16 Despite this reservation, the proposed settlement "falls within the range of
17 possible approval," and meets other basic requirements for preliminary approval. *In*
18 *re Tableware Antitrust Litig.*, 484 F.Supp.2d 1078, 1079 (N.D. Cal. 2007). The
19 parties would be well-served, however, by considering an amendment to the scope
20 of the release and, in any event, should be prepared to address this concern again at
21 the final approval hearing. With that caution in mind, and good cause appearing, the
22 parties' motion to certify a provisional class and for preliminary approval of the
23 class action settlement is granted for the reasons set forth below.

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25 WHEREAS, Plaintiff Abdullah Byanooni filed a putative class action in San
26 Francisco Superior Court against Defendants Merrill Lynch, Pierce, Fenner & Smith
27 Inc. and Bank of America Corporation (collectively, "Defendants") captioned
28 *Abdullah Byanooni v. Merrill Lynch, et al.*, Case No. CGC-12-523355, which

1 Defendants removed to the United States District Court for the Northern District of
2 California on October 12, 2012;

3 WHEREAS, the Parties to the Action have agreed, subject to Court approval
4 following notice to the proposed settlement class (as described in Paragraph 3
5 below) and a hearing, to settle the Action upon the terms and conditions set forth in
6 the Settlement Agreement, and the Parties now request a preliminary certification
7 of a Fed. R. Civ. P. 23(b)(3) settlement class and preliminary approval of the
8 proposed class-action settlement;

9 WHEREAS, this Court has reviewed the Settlement Agreement, as well as
10 the files, records and proceedings to date in this matter;

11 WHEREAS, for purposes of this Order, capitalized terms not specifically
12 defined below have the meaning ascribed to them in the Settlement Agreement,
13 unless otherwise defined; and

14 WHEREAS, for purposes of the Action, this Court has subject matter and
15 personal jurisdiction over the Parties, including all Settlement Class Members.

16 NOW, THEREFORE, based on this Court's review of the Settlement
17 Agreement and all of the files, records, and proceedings herein, the Court
18 concludes, upon preliminary examination, that the Settlement Agreement and
19 settlement appear fair, reasonable, and adequate, and within the range of
20 reasonableness for preliminary settlement approval, and that a hearing should and
21 will be held after notice to the Settlement Class (as described in Paragraph 3
22 below) to confirm that the Settlement Agreement and settlement are fair,
23 reasonable and adequate and to determine whether the settlement should be
24 approved and final judgment entered in the Action based upon the Settlement
25 Agreement.

26 The Court has read and considered the Settlement Agreement and Release
27 ("Settlement Agreement"), Preliminary Approval Motion and the record.

28 **NOW, THEREFORE IT IS HEREBY ORDERED:**

1. Jurisdiction. The Court has jurisdiction over the subject matter of the Action and over all settling Parties hereto.

2. Preliminary Approval of Proposed Settlement. The Settlement Agreement, including all exhibits thereto, is preliminarily approved as fair, reasonable and adequate and within the range of reasonableness for preliminary settlement approval. The Court finds that:

(a) the Settlement Agreement resulted from extensive arm's-length negotiations; and

(b) the Settlement Agreement is sufficient to warrant notice of the settlement to persons in the Settlement Class and a full hearing on the approval of the Settlement.

3. Class Certification for Settlement Purposes Only. Pursuant to Federal Rule of Civil Procedure 23(c), the Court conditionally certifies, for settlement purposes only, the following Class (also referred to as "Settlement Class"):

All customers of Merrill Lynch's Merrill Edge Advisory Center and self-directed online investment platform within the State of California who, on or after August 17, 2011 through the date of preliminary approval, received a telephone call from Merrill Lynch that was recorded and/or monitored.

(Members of the Class are referred to as "Class Members.")

In connection with this conditional certification, the Court makes the following preliminary findings:

a. The Settlement Class appears to be so numerous that joinder of all members is impracticable;

b. There appear to be questions of law or fact common to the Settlement Class for purposes of determining whether this settlement should be approved;

c. Plaintiff's claims appear to be typical of the claims being resolved through the proposed settlement;

1 d. Plaintiff appears to be capable of fairly and adequately protecting the
2 interests of the Class Members in connection with the proposed
3 settlement;

4 e. For purposes of determining whether the settlement is fair, reasonable
5 and adequate, common questions of law and fact appear to predominate
6 over questions affecting only individual Class Members. Accordingly,
7 the Settlement Class appears to be sufficiently cohesive to warrant
8 settlement by representation; and

9 f. For purposes of settlement, certification of the Settlement Class appears
10 to be superior to other available methods for the fair and efficient
11 settlement of the claims of the Settlement Class Members.

12 4. Class Representative. Plaintiff Abdullah Byanooni is designated as the class
13 representative for the Settlement Class.

14 5. Class Counsel. The Court appoints Orshansky & Yeremian LLP as counsel
15 for the Settlement Class. The Court finds that counsel is competent and
16 capable of exercising all responsibilities as Class Counsel for the Settlement
17 Class.

18 6. Settlement Hearing. A final approval hearing (the “Settlement Hearing”) shall be held before the Honorable Richard Seeborg at the U.S. District Court
19 for the Northern District of California, located at 450 Golden Gate Avenue,
20 San Francisco, CA 94102, in Courtroom 3, on Thursday, March 19, 2015, at
21 1:30 p.m., as set forth in the notice to the Settlement Class, to determine
22 whether the Settlement Agreement is fair, reasonable, and adequate and
23 should be approved. Papers in support of final approval of the Settlement
24 Agreement, the incentive award to Plaintiff and Class Counsel’s application
25 for an award of attorneys’ fees, costs and expenses (the “Fee Application”) shall be duly filed with the Court. The Settlement Hearing may be
26 postponed, adjourned, or continued by order of the Court without further
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1 notice to the Settlement Class. After the Settlement Hearing, the Court may
2 enter a settlement order and final judgment in accordance with the Settlement
3 Agreement that will adjudicate the rights of the Class Members with respect
4 to the claims being released.

- 5 7. Class Notice. The notice of settlement (referred to as the “Class Notice”)
6 shall be completed within ninety-five (95) days following entry of this Order.

7 (a) Internet Notice. The Claims Administrator will establish and maintain
8 an Internet site using domain name www.CAcallrecordingclassaction.com
9 dedicated to the Settlement, on which will be posted the Publication Notice
10 (Short Form Notice), the Long Form Notice, the Claim Form, the Settlement
11 Agreement with Exhibits, the operative complaint in the Action, any attorneys’
12 fees and costs application and any Orders relating to Preliminary Approval or
13 Final Approval, and any other information the Parties deem proper. The
14 Settlement webpage will be established prior to the publication of notice.

15 (b) Email Notice. The Claims Administrator will provide notice via
16 electronic mail to all Class Members for whom Defendants determine they have
17 a reasonably reliable email address.

18 (c) California-wide Publication. The Claims Administrator will cause the
19 Short Form Notice, substantially in the form of Exhibit A of the Settlement
20 Agreement (as modified after the hearing on this motion, *see* ECF No. 42), to
21 be published within 95 days of the issuance of this Order in *Parade* magazine
22 and *USA Weekend* magazine.

23 (d) CAFA Notice. In compliance with the Class Action Fairness Act of
24 2005, Pub. L. No. 109-2, 119 Stat. 4, and as set forth in the Settlement
25 Agreement, Defendants shall be ultimately responsible for serving written
26 notice of the proposed class action settlement on the person who has the
27 primary Federal regulatory or supervisory responsibility with respect to
28 Defendants.

1 (e) Declaration to be Filed regarding Notice. At least ten (10) days prior
2 to the Final Approval Hearing, the Claims Administrator shall file a declaration
3 of compliance with the notice procedures as set forth in the Settlement
4 Agreement.

5 (f) Findings concerning Class Notice. The Court finds that the foregoing
6 program of Class Notice and the manner of its dissemination is the best
7 practicable notice under the circumstances and is reasonably calculated to
8 apprise Settlement Class Members of the pendency of the Action and their right
9 to object to or exclude themselves from the Settlement Class. The Court further
10 finds that the Class Notice program is reasonable, that it constitutes due,
11 adequate, and sufficient notice to all persons entitled to receive notice, and that
12 it meets the requirements of due process and Federal Rule of Civil Procedure
13 23.

14 (g) Approval of Claims Process and Settlement Procedure. The claims
15 submission processes described in the Settlement Agreement are hereby
16 approved. The Court preliminarily approves the process set forth in the
17 Settlement Agreement for submitting, reviewing, approving and paying all
18 claims as described in the Settlement Agreement.

19 (h) Costs of Administration, Incentive Payments, and Attorneys' Fees.
20 The Court also approves the process for paying the costs of notice and claims
21 administration, the incentive payments and the Class Counsel's attorneys' fees
22 and litigation costs. These costs will be paid out of the Settlement Fund, prior
23 to any disbursement of the remaining amount on a pro-rata basis to the
24 Settlement Class Members who submit timely and valid claim forms.

25 8. Exclusion from the Settlement Class.

26 (a) Class Members have the right to opt out and exclude themselves from
27 the settlement by mailing an exclusion request ("Exclusion Request") to the
28 Claims Administrator. The Exclusion Request must be postmarked on or

1 before the date specified in the Notice, which is 95 days from the completion of
2 notice by publication. The Claims Administrator will provide copies of such
3 exclusion requests to Class Counsel and counsel for Defendants. All Class
4 Members who do not properly and timely complete and mail the Exclusion
5 Request will be bound by the Settlement Agreement and the Final Judgment to
6 be entered following the hearing for final approval of the settlement.

7 (b) Exclusion Requests must: (i) be in writing; (ii) be signed by the Class
8 Member; (iii) include the full name, address, and telephone number of the
9 person(s) requesting exclusion; (iv) include the name and case number of the
10 Action; and (v) include a statement to the effect that they wish to be excluded
11 from this Settlement. No request for exclusion will be valid unless all of the
12 information described above is included. No Class Member, or any person
13 acting on behalf of or in concert or participation with that Class Member, may
14 exclude any other Class Member from the Settlement Class.

15 (c) The Claims Administrator will retain a copy of all requests for
16 exclusion. Not later than ten days before the Final Approval Hearing, the
17 Claims Administrator shall file with the Court a declaration that lists all of the
18 opt-outs received.

19 (d) If 1,000 or more Class Members opt-out of the Settlement Agreement
20 by timely submitting an Exclusion Request, then Defendants, in their sole
21 discretion, shall have the right to terminate the settlement. In the event that the
22 settlement is terminated, the Parties will be returned to the status quo ante as if
23 no settlement had been negotiated or entered into as set forth in Section 18 of
24 the Settlement Agreement.

25 9. Objections and Appearances.

26 (a) Any person in the Class who has not timely submitted a valid request
27 for exclusion from the Class may appear at the Final Approval Hearing to argue
28 that the proposed Settlement should not be approved and/or to oppose the

1 application of Class Counsel for an award of attorneys' fees and the incentive
2 award to the Plaintiff.

3 (b) In order to be heard at the hearing, the person must make any
4 objection in writing and file it with the Court within 95 days of the completion
5 of notice by publication. The objection must also be mailed to the Claims
6 Administrator, located at Byanooni v. Merrill Lynch, c/o GCG, P.O. Box
7 35121, Seattle, WA 98124-5118, and postmarked not later than 95 days after
8 the completion of notice by publication.

9 (c) Any Objection filed with the Court and submitted to the Claims
10 Administrator must set forth the name and case number of this matter; Class
11 Member's name, address, and telephone number; all arguments, citations, and
12 evidence supporting the Objection; and a statement of whether the objecting
13 Class Member intends to appear at the hearing for final approval of the class
14 action settlement and whether the objecting Class Member intends to appear at
15 the hearing with or without counsel. The Claims Administrator will provide
16 copies of such Objections to Class Counsel and Defendants' counsel.

17 (d) Any Class Member who fails to comply with these provisions or file a
18 timely Objection pursuant to the Settlement Agreement and as detailed in the
19 Notice, shall waive and forfeit any and all rights the Class Member may have to
20 appear separately and/or object, and shall be bound by all the terms of this
21 Order and the Settlement, and all proceedings, orders, and judgments in the
22 Action. Any Class Member with objections that are not timely filed and mailed
23 shall not be permitted to object to the Settlement at the Final Approval Hearing,
24 and shall be foreclosed from seeking any review of the Settlement by appeal or
25 other means.

26 (e) On or before the date specified in the Notice, which is 95 days from
27 the completion of notice by publication, a Class Member may enter an
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1 appearance through an attorney if he or she so desires. The Class Member is
2 solely responsible for any fees, costs, or expenses of his or her attorney.

3 10. Further Papers in Support of Settlement and Fee Application. Any responses
4 to objections to the Settlement Agreement shall be filed with the Court on or
5 before the date of the Final Approval Hearing. Any general briefing in
6 support of final approval of the Settlement or Class Counsel's request for
7 fees and costs not specifically directed to objections shall be filed thirty-five
8 (35) days before the Final Approval Hearing.

9 11. Effect of Failure to Approve the Agreement. In the event the Settlement
10 Agreement is not approved by the Court, or for any reason the Parties fail to
11 obtain a Final Judgment as contemplated in the Settlement Agreement, or the
12 Settlement Agreement is terminated pursuant to its terms for any reason, or if
13 the Settlement or the judgment approving the Settlement is appealed and is
14 not approved on appeal in substantially the same form as set forth in the
15 Settlement Agreement, then the following shall apply:

16 (a) All orders and findings entered in connection with the Agreement
17 shall become null and void and have no further force and effect, shall not be
18 used or referred to for any purposes whatsoever, and shall not be admissible
19 or discoverable in any other proceeding;

20 (b) The conditional certification of the Settlement Class pursuant to this
21 Order shall be vacated automatically and void; no doctrine of waiver,
22 estoppel or preclusion shall be asserted in any litigated certification
23 proceedings in the Action; and the Settlement Agreement, its existence and
24 any draft thereof, and any discussion, negotiation, documentation, or other
25 part or aspect of the Parties' settlement discussions leading to the execution
26 of the Settlement Agreement shall have no effect and shall not be admissible
27 evidence for any purpose, including to establish any fact relevant to class
28 certification or any alleged liability of Defendants for the matters alleged in

1 the Action or for any other purpose;

2 (c) The Settlement Agreement and all of its provisions and all
3 negotiations, statements, and proceedings relating to the Settlement
4 Agreement shall be without prejudice to the rights of any of the Parties;

5 (d) Nothing contained in this Order is, or may be construed as, any
6 admission or concession by or against Defendants or Plaintiff on any point
7 of fact or law;

8 (e) The Parties shall be restored to their respective positions as of the
9 date the Settlement Agreement was fully executed; and

10 (f) Neither the Settlement nor any publicly disseminated information
11 regarding the Settlement, including, without limitation, the class notices,
12 court filings, orders and public statements, may be used as evidence for any
13 purpose whatsoever. In addition, neither the fact of, nor any documents
14 relating to, Defendants' withdrawal from the Settlement, any failure of the
15 Court to approve the Settlement and/or any objections or interventions may
16 be used as evidence for any purpose whatsoever.

17 12. Stay/Bar of Other Proceedings. All proceedings in the Action are stayed
18 until further order of the Court, except as may be necessary to implement the
19 terms of the Settlement. Pending final determination of whether the
20 Settlement should be approved, Plaintiff, all persons in the Settlement Class,
21 and persons purporting to act on their behalf are enjoined from commencing
22 or prosecuting (either directly, representatively or in any other capacity)
23 against any of the Released Parties any action, arbitration, or proceeding in
24 any court, arbitration forum, or tribunal asserting any of the claims to be
25 released by the Settlement Agreement.

26 13. Continuing Jurisdiction. The Court retains continuing and exclusive
27 jurisdiction over the action to consider all further matters arising out of or
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connected with the Settlement, including the administration and enforcement
of the Settlement Agreement.

Dated: 8/4/14



HON. RICHARD SEEBORG
UNITED STATES DISTRICT JUDGE

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